

STATE OF MICHIGAN
COURT OF APPEALS

IDA GOUGEON and JOHN GOUGEON,

Plaintiffs-Appellants,

v

THE DETROIT EDISON COMPANY,

Defendant-Appellee.

UNPUBLISHED

May 11, 2006

No. 259161

Macomb Circuit Court

LC No. 03-001773-NZ

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

This personal injury action arose out of a house fire, which was caused when an overhead electrical wire owned by defendant separated and fell onto a fence behind plaintiffs' house. Plaintiffs fled their home, but watched the fire from nearby. The fire damaged plaintiffs' home and other property.

Plaintiffs filed this action against defendant, seeking damages for physical and emotional injuries allegedly sustained as a result of witnessing the fire. Plaintiffs alleged that Ida Gougeon "suffered illness, emotional distress and a heart attack while watching flames engulf her home and personal belongings," and that John Gougeon "witnessed his wife's illness and heart attack" and "suffered emotional distress" as a result. Plaintiffs asserted, *inter alia*, claims of ordinary negligence, negligent infliction of emotional distress, breach of implied warranty, nuisance, trespass, willful and wanton misconduct, and gross negligence.

Defendant moved for summary disposition under MCR 2.116(C)(10). Most of plaintiffs' claims were dismissed. With respect to plaintiffs' remaining claim of ordinary negligence, which is the only claim at issue in this appeal, defendant asserted that there was no evidence that the fire had caused Ida Gougeon's heart condition, and no evidence that defendant had been negligent in the installation, inspection, maintenance, and control of the power line. The trial court granted defendant's motion for summary disposition on the issue of causation. The court also noted, without discussing further facts, that there was insufficient evidence of defendant's alleged negligence.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

To establish a prima facie case of negligence, a plaintiff must be able to prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Haliw v City of Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Proof of causation requires proof of both (1) cause in fact, and (2) proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact requires a showing that "but for" the defendant's actions, the alleged injury would not have occurred. *Id.* at 163. Cause in fact must be established before proximate cause becomes a relevant issue. *Id.*

Although a plaintiff is not required to present direct proof of causation to withstand summary disposition, a plaintiff must present some substantial evidence of causation. *Id.* at 163-164. In *Skinner*, our Supreme Court explained the requisite degree of proof a plaintiff must satisfy to survive summary disposition on the issue of causation:

[A] causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. *Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory.* Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Id.* at 164-165 (emphasis added).]

Evidence of causation proffered by a plaintiff "must exclude other reasonable hypotheses with a fair amount of certainty," and negligence is not established if the evidence of causation is equally consistent with inconsistent or contradictory hypotheses. *Id.* at 166-167. "[C]ausation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying a defendant's motion for summary [disposition]." *Id.* at 172-173.

We agree with the trial court that, even viewed in a light most favorable to plaintiffs, the admissible evidence did not create an issue of material fact with respect to the factual cause of plaintiffs' injuries. First, there was no evidence that Ida Gougeon, aged 75 at the time of the incident, sustained a heart attack during the fire. Both plaintiffs testified that neither Dr. Gordhan Diora, plaintiff Ida's internist, nor anyone else told them that Ida had suffered a heart attack because of the fire.

Moreover, although it is undisputed that Ida suffered a cardiac injury, plaintiffs failed to offer any substantively admissible evidence to exclude the alternate reasonable explanation that Ida's heart problems preceded the fire. The record indicated that Ida had an extensive cardiac history before the fire, and that persistent congestive heart failure had been troubling her on September 13, 2000, the day *before* the fire. Dr. Diora testified that he had been treating Ida since 1994 for several issues, including an irregular heartbeat, insulin dependent diabetes, high

blood pressure, congestive heart failure, atherosclerosis, and left ventricle hypertrophy. Ida was hospitalized in May and June 1999 for an unstable angina caused by blockages in her coronary arteries, in October 1999 for an implantation of a pacemaker to control her irregular heartbeat, and in November 1999 for a cardio version when the pacemaker failed to control her rapid heartbeat. Diora explained that Ida had experienced these various heart problems because of the atherosclerosis, which in turn was caused by her hypertension, diabetes, and aging. Diora described Ida's cardiovascular problems as "serious," and expected them to worsen over time. Diora testified that, given Ida's cardiac conditions, she would have been at an increased risk of heart injury "even if there was no fire."

The fire underlying this case occurred on September 14, 2000, at approximately 5:00 p.m. The record shows that Diora had run blood tests on Ida in the days preceding the fire, the results of which were received on the morning of September 14, 2000. Diora determined at that time that Ida had developed hypothyroidism, and called plaintiffs on the telephone to advise them of the test results. Diora indicated that plaintiffs told him during the telephone call that Ida had already experienced an episode of angina earlier that day. Ida's cardiologist, Dr. Nishit Choksi, testified that he first discovered a blockage in Ida's left descending artery in 1999. He explained that by 2000, the blockage had become severe. Both Diora and Choksi indicated that, based on Ida's documented complaints of angina before the house fire, it was likely that a cardiac event was already underway before the fire.

At 9:00 p.m. on September 14, 2000, approximately four hours after the fire, Ida was admitted to the hospital. The record indicates that Ida told an emergency room physician that she had experienced pain at 1:00 p.m., which was approximately four hours before the fire. The evidence also shows that Ida told a consulting cardiologist, Dr. Robert Moore, that she had experienced three episodes of chest pain on September 14, 2000, two of which had occurred "before the fire," with the first occurring at about 1:00 p.m.

Plaintiffs assert that the emergency room physician's notation that Ida told him that she had experienced pain beginning at 1:00 p.m. on the day of the fire, and Moore's notation that Ida told him that she had experienced two episodes of chest pain before the fire, "are obviously not accurate." But plaintiffs did not offer any evidence to establish a factual dispute with regard to the accuracy of these records. Moreover, plaintiffs did not challenge the authenticity or admissibility of these records, and did not depose the two physicians with regard to the accuracy of their notations. Plaintiffs also contend that Diora "mixed up his recollection of events when dictating." However, plaintiffs did not present any evidence to support their contention that Diora's notes were inaccurate. Moreover, Diora testified at his deposition that the sequence of events contained in his notations was accurate.

Finally, plaintiffs argue that there was a genuine issue of material fact regarding the cause of Ida's injuries because both plaintiffs and their daughter, Beth Gougeon, were all "adamant that all was normal with Mrs. Gougeon, health-wise, until the fire occurred." However, when Ida visited Diora on the day before the fire, her primary diagnosis was already persistent congestive heart failure. Thus, the evidence does not support plaintiffs' claim that, at the time of the fire, all was "normal" with Ida's health.

In sum, plaintiffs failed to produce sufficient evidence from which a jury could conclude that, more likely than not, the fire caused Ida to suffer a heart attack or other cardiovascular

injury. In contrast, there was substantial evidence showing that Ida's heart problems predated the fire, and that a cardiac episode was already underway at the time the fire occurred. When opposing a motion for summary disposition, the nonmoving party "must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact," *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993), and must "exclude other reasonable hypotheses [of causation] with a fair amount of certainty," *Skinner, supra* at 166. In the case at bar, the evidence does not "exclude . . . with a fair amount of certainty" the possibility that plaintiff Ida Gougeon's injuries were caused by her preexisting heart condition rather than by witnessing the house fire. The proffered evidence was therefore legally insufficient to establish a genuine factual dispute regarding causation. *Id.* Because plaintiffs failed to set forth sufficient facts to establish a genuine factual dispute with respect to causation, summary disposition was properly granted for defendant.

In light of our resolution of this case, we need not address whether the evidence created a genuine issue of fact regarding defendant's alleged negligence.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Brian K. Zahra